93-478

CASE NO._____

Supreme Court, U.S.
FILED
MAR 24 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States

OCTOBER TERM 1991

JOHN DANIEL MACLEOD III,
Petitioner,

vs.

VIRGINIA BEACH CORRECTIONAL CENTER,
DEPUTY HALEY, et. al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John Daniel MacLeod III, pro se
Bland Correctional Center
Route 2, Box 143
Bland, VA 24315-9615

52 pp

QUESTIONS PRESENTED

(A) Does a court's violation of its own rules prejudicial to a litigant create a reasonable presumption of that court's prejudice against the litigant sufficient to command recusal?

(B) Must a court confine itself to the sufficiency of the affidavit when considering a recusal motion?

(C) Was the affidavit filed in this matter sufficient, in fact, to command recusal?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, John Daniel MacLeod III, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on November 15th, 1991.

I.
OPINION BELOW

The decision of the District Court for the Eastern District of Virginia is attached as Appendix A. The opinion of the Circuit Court is attached as Appendix B. The Circuit Court's denial of the Petition for Rehearing is attached as Appendix C.

II.
JURISDICTION

The Fourth Circuit Court of Appeals denial of the Petition for Rehearing was filed on December 26th, 1991. The original of this Petition was received by the Clerk on March 24, 1992 (see Appendix E). The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254 (1).

III.
CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual servi[illegible]n time of War or public danger; nor shall any person be subject [illegible]e same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(emphasis added to pertinent section)

IV.
STATUTORY PROVISION INVOLVED

Title 28 U.S.C. §144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the Judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such Judge shall proceed no further therein, but another Judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed not less than ten days before the beginning of a term [session] at which the proceeding is to be heard or good cause shall be shown for the failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

V.
STATEMENT OF THE FACTS

On July 8th, 1990, the Petitioner in this matter, John D. MacLeod III, was maliciously charged with a major violation of the rules of the Virginia Beach Correctional Center, where he was being detained pending trial, by probationary Sheriff's Deputies as part of a blanket retaliation against other inmates with whom they had been involved in a verbal conflict earlier the same morning.

Knowing that his liberty interests in pre-sentence reporting and parole consideration would be grievously prejudiced by such a charge if it were not promptly and conclusively refuted, the Petitioner immediately protested. (The Petitioner has since filed the Affidavit of another inmate who was denied parole as a direct of just such an unresolved charge).

In response to the Petitioner's protest, an attempt to cover-up the incident was followed by the creation of an altered version of the original untenable violation report and the Petitioner being selectively and unjustifiably locked down and denied visitation by the watch commander who exceeded his authority in doing so while the Commanding Officer of Corrections was present at the facility.

Early the following morning, July 9th, 1990, the Petitioner was released from cell restriction and issued a copy of the second version of the violation report which stated that the charge had been "Dismissed with a warning" which, being tantamount to a motion to nolle prosequi, inferred that he was, in fact, guilty of the offense but had not been prosecuted for reasons unknown and therefore eliminated only the immediate, and rather inconsequential, threat of disciplinary action while doing little, if anything, to eliminate the significant threat to his future liberty interests.

On July 13th, 1990, the Petitioner met with the Commanding Officer of Corrections, W. C. Smith, and requested that the matter proceed to the normal board hearing so that he could exonerate

himself. Mr. Smith flatly refused to allow the matter to go forward stating that he had done everything he was going to do.

On July 29th, 1990, the Plaintiff filed suit in the United States District Court alleging that Deputy Haley and other as yet to be conclusively inculpated employees of the Virginia Beach Correctional Center had conspired to accuse and convict him of a major violation of the Rules of that facility when, in fact, no such offense had been committed; that he had been unjustifiably restricted to his cell and denied his state created liberty interest in visitation with his sister and her family who had, coincidentally, been in route from their home in Boston, Massachusetts at the time of the incident; that he had been denied due process in bringing the matter to a proper resolution.

As relief the Petitioner sought, first and foremost, his Constitutionally guaranteed right to due process in bringing the matter to a proper resolution, and reasonable compensation for his sister's travel expenses as well as reasonable punitive damages due to the flagrancy of the violations of the Petitioner's rights which damages, it was originally intended, would be forgiven in a settlement of the matter if the Correctional Center would make a good faith effort to guard against future abuses by having sequentially numbered and accounted for violation reports printed which, in the instant case, would have bound the probationary Deputies by their original report and eliminated the temptation to attempt the cover-up they chose to pursue.

As a direct result of the District Court's refusal to make allowance for the fact that the Petitioner had only become indigent shortly before the suit was filed, the matter was delayed for an inordinate eight months during which time the Petitioner was selectively denied access to the courts though having been forced to assume his own defense against the serious criminal charge for which he was being detained, was convicted of that charge as a result of his lack of access to the courts, was ultimately denied the benefits of a pre-sentence report, and remains in jeopardy of unfavorable

consideration in his upcoming parole hearings due to the matter remaining unresolved.

The Defendants were finally compelled to respond on February 7th, 1991, and as might have been expected, avoided answering by filing an untenable 12(b)(6) motion in which a half-hearted attempt was made to confine the matter to the relatively inconsequential denial of visitation claim and thereby assert that the Petitioner had failed to state a cognizable claim. Though it should not have been necessary for him to do so, the Petitioner filed a well reasoned memorandum and supporting affidavit conclusively refuting the Defendant's untenable motion and prepared to proceed with discovery.

On June 10th, of 1991, the District Court issued the Order attached as Exhibit F1-F4 to Appendix D, Motion to Recuse, quite incredibly granting the Defendant's motion by selectively ignoring the factual elements of the Petitioner's valid due process claim and imparting facial validity to the Order by deleting the as yet unnamed parties in violation of Rule 21.

By proper Motion and supporting Affidavit filed on June 21st, 1991, clearly setting forth in intimate detail, with supporting documentation, the alteration of the caption of the matter in violation of Rule 21, as well as documentary evidence of the same court having previously demonstrated almost religious adherence to Rule 21 which precluded any possibility of the violation being dismissed as a simple oversight, the Plaintiff moved for the recusal of the District Court Judge in question from further proceedings in this or any other matter to which the Plaintiff was a party.

By Order of July 8th, 1991, the District Court judge in question, continuing to ignore the factual elements of the Plaintiff's valid due process claim, denied the recusal motion by attempting to justify his disposition of the matter with various untenable arguments but at no time did he address, or even acknowledge, his uncharacteristic violation of Rule 21 or the sufficiency of such a violation to command recusal.

By invitation, the Plaintiff appealed the matter to the Fourth Circuit Court of Appeals on July 23rd, 1991, and filed an informal brief on August 20th, 1991, suggesting that, albeit by invitation, the matter should more properly be pursued by Writ of Mandamus and construed as such, however, by decision filed on November 15, 1991, a panel of judges of the Fourth Circuit Court of Appeals proceeded to rule on the matter, construing it as a direct appeal which accounts for the matter having reached this Court in its present form, and denied it by simple affirmance of the reasoning of the District Court.

As the panel's disposition of the matter was so grossly inconsistent with the Statute and existing authority, the Plaintiff, on November 23rd, 1991, filed a Petition for Rehearing with a suggestion for rehearing in banc in order to insure against any possibility that a fraud had been perpetrated on that court. The Petition and suggestion were denied on December 26th, 1991, without a single member of the court having requested a poll on the suggestion and so the matter has come before this Court.

VI.
ARGUMENT

A. A court's violation of its own rules prejudicial to a particular litigant does create a reasonable presumption of that court's prejudice against such a particular litigant sufficient to command recusal.

At least two Circuits have affirmed as much, the 1st in United States v Bourque, 541 F.2d 290,296 (1st Cir. 1976) which involved a potential violation of Rule 32 Fed. R. Crim. P., and the 7th in Peacock Records, Inc. v. Checker Records, Inc., 430 F.2d 85, 87 (7th Cir. 1970) considering a violation of Rule 60 (b) Fed. R. Civ. P., what's more, the tone of Bourque would seem to suggest the

principle was so firmly established that citation of this court's opinions on the subject were unnecessary and with good reason, as one need only consider the ease with which a District Court Judge, possessed of devious intent, can obstruct a valid cause of action, or perpetuate an invalid one, by simply abusing his discretion without resort to outright criminal misconduct or, in fact, any possibility of his being subject to retribution.

Indeed, coincident with this matter, the self same Judge has been assailed for blatantly perpetuating the untenable contest of a Virginia shipyard to the award of a government contract to a rival New England firm for, there was little doubt in the minds of reasonable men, the sole and specific purpose of promoting the profit and expansion motives of the constituents of the U. S. Senator, University of Virginia classmate, and fellow Republican who had nominated him for appointment to the Federal Bench and said constituents having been the current owners of that Virginia shipyard and not the actual shipbuilders, three generations of this litigants family among them, who, having heretofore meritoriously earned a disproportionate share of the world's shipbuilding contracts by virtue of the quality of their handiwork, neither invited nor welcomed the intervention of corrupt politicians but will ultimately bear the stigma created by their actions, while the Judge in question has escaped retribution by hiding behind the shield of his discretion.

When, therefore, such a Judge crosses the line from abuse of discretion to outright obstruction of justice by committing what, as another Norfolk area Judge recently learned the hard way, amounts to a criminal act under Virginia law, for which the judge in question, by virtue of Virginia's concurrent jurisdiction on Federal property whether leased or owned, may yet be subject to prosecution, it is inconceivable that recusal should not be mandatory.

B. A court must confine itself to the sufficiency of the affidavit when considering a recusal motion.

That principle has already been affirmed by numerous other Circuits in cases such as Mims v. Shapp, 541 F.2d 415 (3rd Cir. 1976) and Phillips v. Joint Legislative Comm., etc., 637 F.2d 1014 (7th Cir. 1981) as well as by the Fourth Circuit itself in matters such Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978), In Re Beard, 811 F.2d 818 (4th Cir. 1987), and Sine v. Local 992 Intl. Bhd of Teamsters, 882 F.2d 913 (4th Cir. 1989).

Yet, in the instant case, the Fourth Circuit Court of Appeals affirmed on the reasoning of the Judge in question whose opinion was nothing more than an attempt to justify his disposition of the matter by rearguing the case, while, in actual response to the recusal motion, which was confined solely to the style of the matter having been altered in violation of Rule 21, never once having mentioned Rule 21 or made any attempt to explain, justify, or even acknowledge his uncharacteristic violation of the Rule.

C. The affidavit filed in this matter was, in fact, sufficient to command recusal.

Unquestionably, the Affidavit, in and of itself, was sufficient to have commanded recusal without the necessity of the Petitioner having to resort to a scandalous recitation of the potential extrajudicial sources of the District Court's prejudice, however, as the Fourth Circuit has seen fit to resort to totally unjustified attacks on this Petitioner's motives while attempting to backstop the District Court, some mention must, unfortunately, be made of those potential sources else this Petitioner might, once again, become the victim of such defamatory attacks.

Save for this litigant, perhaps naive, reliance on the universal capacity of the Federal judiciary to transcend personal considerations while dispatching the duties of their offices, there would have been, and apparently was, every reason to have questioned the impartiality of any of the Judges of Virginia's Eastern District in this matter.

Initially this stems from the fact that both the Petitioner's wife who is, incidentally, directly responsible for the Petitioner's initial

conviction and incarceration, and his sister-in-law are, or were both employed by fellow Judge J. Calvit Clark and there is every reason to believe that both of the remaining Judges were aware, by way of fraternal and sociological contacts, of those relationships.

Naturally, had the case been assigned to him, Judge Clark would have been recusable, and no doubt would have done so of his own volition, under §455, however, said Judge is also scheduled to be called as an adverse witness in this Petitioner's ongoing divorce proceedings wherein the testimony and evidence adduced may, at least, embarrass and, at most, could conceivably lead to his impeachment and perhaps even criminal prosecution, therefore, as an out of court settlement of that matter, which becomes ever more likely so long as the Petitioner remains incarcerated, would spare Judge Clark, either of the remaining Judges could conceivably have been motivated by that possibility to deliberately obstruct this Petitioner's efforts to exonerate himself and regain his freedom.

Moving on to the actual Judge in question to whom the case was assigned, he is, at least, closely associated, within Norfolk's close knit Lebanese community, if not actually related, perhaps even within the familial degree necessary to command recusal under §455, to Norfolk Attorney J. Gerard Zoby against whose firm the Petitioner has a cause of action for substantial damages and whose financial interests would, and have, benefited substantially from dismissal and even delay in the matter being adjudicated.

And, in yet another revelation, it has recently been suggested that a familial relationship, again within Norfolk's close knit Lebanese community and again perhaps even within the degree of relationship necessary to command recusal under §455, may exist between the Judge in question and the wife of yet another prominent Norfolk Attorney against whom the Petitioner had recently prevailed in another action and who, though having been decidedly in the wrong, is known to harbor considerable resentment as a result of having been embarrassed by the matter.

VII.
CONCLUSION

The Petitioner in this matter filed a proper motion sufficient to command the recusal of the Judge in question and remains in jeopardy of that Judge's prejudice should his Writ of Habeas Corpus or the matter which gave rise to this Petition be remanded as well as in the consideration of a successive Habeus Petition should one become necessary.

This Court has an absolute obligation to protect the Petitioner and the integrity of the Judiciary at large by remanding the matter for a proper disposition.

Respectfully submitted,

/s/

John Daniel MacLeod III
Bland Correctional Center
Route 2, Box 143
Bland, VA 24315-9615

Dated: March 23, 1992

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that a true copy of the foregoing Petition has been mailed to Conrad M. Shumadine and Mark D. Stiles, WILCOX & SAVAGE, P.C., 1800 Sovran Center, Norfolk, VA 23510-2197 on the 23rd day of March, 1992.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Filed July 8, 1991

JOHN DANIEL MACLEOD
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER
and
DEPUTY HALEY,
Defendants.

JOHN DANIEL MACLEOD,
Petitioner,

v. Civil Action No. 91-36-N

EDWARD W. MURRAY,
Director of the Virginia Department of Corrections,
Respondent.

ORDER

Movant John Daniel MacLeod, a Virginia inmate proceeding pro se, has moved for the recusal of the undersigned from the two above-styled cases, one a suit pursuant to 42 U.S.C. § 1983 and the other petition pursuant to 28 U.S.C. § 2254.

MacLeod contends that the undersigned has a personal bias or prejudice against him. This belief apparently stems from the fact that the style of the final order dismissing the § 1983 suit (CA 91-68-N), entered June 10, 1991, indicated that the defendants were the Virginia Beach Correctional Center and Deputy Haley. MacLeod's original complaint was styled as a suit against "Virginia Beach Correctional Center, Deputy Haley, et al." The complaint made allegations against Deputy Haley "and others." At no time during the proceedings did plaintiff identify the "others" he wished to sue. While the Court is exceedingly liberal in its construction of prisoner petitions, the Court is not a mind-reader, and cannot guess at the identity of parties defendant.

In its order of June 10, the Court observed that:

> plaintiff has brought suit only against the deputy who reported the alleged offense, and not the officers who could be considered to have disciplined him, the watch commander and Major Smith.

Slip op. at 2. MacLeod contends that the Court thus wrongfully excluded defendants and used their exclusion to justify dismissal of the case.

Whether construed as a motion for relief from the judgment or a motion for recusal, MacLeod's motion is without foundation. The paragraph of which MacLeod complains was merely dictum, and not essential to the Court's ruling. The order goes on to consider MacLeod's claim for denial of due process in the resolution of the disciplinary charge brought against him, and concluded that MacLeod received due process at all stages of the disciplinary procedure. This analysis necessarily encompassed any allegations purportedly brought against prison officials other than Deputy Haley.

The motion is ORDERED FILED, and is hereby DENIED. Movant is ADVISED that he may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United

States District Court, Room 193 U.S. Courthouse, 600 Granby Street, Norfolk, Virginia 23510, which said written notice must be received by the Clerk within thirty (30) days from the date of this order and may be filed without the prepayment of costs or giving security therefor.

The Clerk is DIRECTED to send a copy of this order to the plaintiff and to counsel for the defendants.

IT IS SO ORDERED.

/s/
United States District Judge

At Norfolk, Virginia
July 8th, 1991

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JOHN DANIEL MACLEOD,
PLAINTIFF-APPELLANT
v.
VIRGINIA BEACH CORRECTIONAL CENTER; DEPUTY HALEY,
DEFENDANTS-APPELLEES.

No. 91-7174

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Robert G. Doumar, District Judge.
(CA-91-68-N)

Submitted: October 28, 1991

Decided: November 15, 1991

Before ERVIN, Chief Judge, SPROUSE, Circuit Judge, and CHAPMAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

John Daniel MacLeod, Appellant Pro Se. Mark Douglas Stiles, WILCOX & SAVAGE, Norfolk, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

Per Curiam:

John Daniel MacLeod, III appeals from the district court's order denying his post-judgment motion for recusal. Our review of the record and the district court's opinion discloses that there was no abuse of discretion and this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. *MacLeod v. Virginia Beach Correctional Ctr.*, No. CA-91-68-N (E.D. Va. July 8, 1991). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
December 26, 1991

No. 91-7174
CA-91-68-N

JOHN DANIEL MACLEOD
Plaintiff-Appellant

v.

VIRGINIA BEACH CORRECTIONAL CENTER;
DEPUTY HALEY
Defendants-Appellees

On Petition for Rehearing with
Suggestion for Rehearing in Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ John M. Greacen
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER, ET AL.,
Defendants.

MOTION TO RESCUSE

COMES NOW the Plaintiff, John D. MacLeod, and files herewith his affidavit, as required by Title 28, United States Code, Section 144, to show that the Honorable Robert G. Doumar has a personal bias or prejudice against him.

Based thereon, the Plaintiff respectfully moves that the Honorable Robert G. Doumar proceed no further herein and that another judge be assigned to hear this proceeding.

Dated June 20th, 1991.

/s/ John D. MacLeod

IN THE UNITED STATES DISTICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER,
et al.,
Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO RECUSE

COMMONWEALTH OF VIRGINIA
COUNTY OF BLAND, to-wit:

This day personally appeared before me, a notary public in and for the Commonwealth of Virginia, County of Bland, John D. MacLeod who, after being duly sworn, states as follows:

1. I am the Plaintiff in the above numbered and entitled case.

2. I am informed and believe, and based on such information and belief, allege that the Honorable Robert G. Doumar, the judge before whom this cause is pending, has a personal bias or prejudice against me.

3. The facts and reasons for the belief that such bias or prejudice exists are:

(A) That the caption of Civil Action No. 91-68-N has been illegally altered in order to exclude legitimate parties thereto.

(B) That the affiant is the Plaintiff in Civil Action No. 91-68-N.

(C) That on or about June 10th, 1991 the Honorable Robert G. Doumar set his hand to an order dismissing the Complaint in Civil Action No. 91-68-N.

(D) That the validity of said Order, referred to in (C) above was dependent on said illegal alteration, described in (A) above.

(E) That in setting his hand to the Order described in (C) above, the Honorable Robert G. Doumar committed, fostered, approved or failed to detect the illegal alteration and exclusion of parties described in (A) above and thereby obstructed justice or allowed justice to be obstructed.

4. That in support of the facts and reasons set forth in three (3) above the following exhibits are attached hereto:

(A) A true copy of the original complaint filed in Civil Action No. 91-68-N which exhibits:

(1) On page one (1) that the Defendants named were:

(a) Virginia Beach Correction Center, an identifable entity and apparent employer believed to be a division of the Virginia Beach Sheriff's Department.

(b) Deputy Haley, who has since been identified as Donald V. Haley.

(c) et al., and others as yet unknown, unidentified or unnamed as may become apparent during the course of these proceedings.

(2) On page two (2) in the facts supporting claim #1 that "Deputy Haley and others" were named.

(3) On page three (3) in the facts supporting claim #3 that "Deputy Haley and others" were named.

(B) A memorandum to the Plaintiff from the Clerk of the U.S. District Court dated August 7th, 1991 exhibiting the

manner in which the caption of the complaint was properly abbreviated by the Clerk pursuent to Rule 10(a) of the Federal Rules of Civil Procedure.

(C) The Caption pages of seven (7) Orders of the District Court in Civil Action No. 91-68-N which were signed and entered by the Honorable Robert G. Doumar prior to the entry of the order in question. These pages are identified as affiants exhibits C1 through C7 and exhibit consistent conformity with the Clerk's initial abbreviation of the caption.

(D) True copies of the Caption pages of eight (8) pleadings filed by the Plaintiff in this matter exhibiting routine conformance with the Clerk's initial abbreviation of the caption. These pages are identified as affiants exhibits D1 through D8.

(E) True copies of the Caption pages of three (3) pleadings filed by the Defendants in this matter which are identified as affiant's exhibits E1 through E3 and exhibit routine conformance with the clerk's initial abbreviation of the caption in this matter.

(F) A true copy of the order in question which exhibits on page one (1) the altered caption, on page two (2) in paragraph two (2) the way in which the altered caption was used to justify dismissal of the complaint and at page (4) the signature of the Honorable Robert G. Doumar.

WHEREFORE the affiant submits that, in the absence of an affirmative showing that the Honorable Robert G. Doumar has been inexcusably negligent in setting his hand to an order which he did not actually author or review for correctness, which inexcusable negligence would, in all events, render him unfit to sit on the Federal Bench, the facts stated herein are irrefutable evidence that the Honorable Robert G. Doumar has deliberately attempted to obstruct the affiants quest for justice due to a personal bias or prejudice, of

unknown origin, against him and should not be allowed to proceed further in any matter to which the affiant is a party pending investigation of the Complaint being filed in the appropriate forum.

Further the affiant saith not.

Dated June 20th, 1991
Subscribed and sworn to before me this 20th day of June, 1991.

/s/
Notary Public
My commission expires: July 13, 1992

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing affidavit has been mailed to Conrad M. Shumadine and Mark D, Stiles, WILCOX & SAVAGE, P.C., 1800 Sovran Center, Norfolk, VA 23510-2197 on the 21st day of June, 1991.

/s/
John D. MacLeod, III

Affiant's Exhibit A

UNDER CIVIL RIGHTS ACT 42 U.S.C. 1983

Name: John Daniel MacLeod, III
Prisoner Number:
Place of Confinement: Virginia Beach Correction Center

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF VIRGINIA

John Daniel MacLeod, III Plaintiff v. Virginia Beach Correction Center Deputy Haley, et al. Defendant	Complaint Case No. C/A 91-68-N

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes_____ No__x__

B. If your answer to A is yes, describe the action in the spaces below. (If more than one action describe the additional actions on the reverse side of the page).

1. Parties to the action:

2. Court (if a federal court, name the district; if a state court, name the city or county):

3. Docket Number:

4. Name of judge to whom case was assigned:

5. Disposition (for example: Is the case still pending? If not, what was the ruling? Was the case appealed? If so, what was the disposition?)

C. Did you present the facts relating to your complaint in the state prison grievance procedure?

Yes_____ No____x____

1. If your answer is yes, what was the result?

2. If your answer is no, explain.

On July 13th, my request to proceed with the appropriate hearing was denied by Capt. W.C. Smith.

D. Statement of Claim:

State here briefly that facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of different claims, number and set forth each claim in a separate paragraph. Use as much space as you need; attach extra pages if necessary.

Claim #1:

Supporting FACTS (tell your story briefly without citing cases or law):

On July 8, 1990, perhaps honestly believing that the plaintiff had gotten away with commiting a major violation of the Correction Centers regulations, Deputy Haley and others conspired to accuse and convict the plaintiff of a major violation of those rules when in fact no such infraction had been committed.

Clain #2

Supporting FACTS (tell your story briefly without citing cases or law:

As a result of the plaintiff being unneccessarily confined to his cell pending a hearing into the matter the plaintiff was refused visitation with his sister, M. M. MacLeod-Silberstein of Boston, MA and her three children on July 8, 1990.

Claim #3

Supporting FACTS (tell you story briefly withour citing cases or law):

Since the plaintiff's immediate protest of the charge, Deputy Haley and others have attempted to cover up the inciodent, altered, forged, destroyed or attempted to destroy records, employed various means on intimidation against the plaintiff and refused to allow the plaintiff to refute the charge in the appropriate forum.

E. State what relief you seek from the Court. Make no legal arguments: do not cite cases or statutes:

1. Permanent inclusion in the plaintiff's records of the true facts, when and how they were determined, in order to insure against the plaintiff being defamed.

2. Physical damages (travel expenses) in the amount of $350.

3. Punitive damages in the amount of $10,000 - and disciplinary action against the deputies involved.

FORMA-PAUPERIS AFFIDAVIT

I hereby apply for leave to proceed with this complaint without prepayment of fees or costs or giving security therefore. In support of my application, I state under oath that the following facts are true:

(1) I am the plaintiff in this complaint, and I believe that I am entitled to redress.

(2) I am unable to prepay the costs of said action, or give security therefore because:

I have been incarcerated since November tenth of nineteen eighty-nine and have exhausted all of my liquid or easily liquidatable assets.

(3) I have no assets or funds which could be used to prepay the fees or costs except: My personal vehicles, 1979 Chevy truck and 1982 Chevy auto and my personal effects and tools in storage. (Write "none" above if you have nothing; otherwise, list your assets).

/s/ John D. MacLeod III

"I declare under penalty of perjury that the foregoing is true and correct."

Executed on July 29, 1990

/s/ John D. MacLeod III

It is no longer necessary to have your petition notarized.

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $_____ on account to his credit at the penal institution where he is confined. I further certify that the petitioner likewise has the following sureties top his credit according to the records of said penal institution:

Authorized Officer of
Penal Institution

AFFIANT'S EXHIBIT B

United States Government
Memorandum

To:	Petitioner
From:	Clerk's Office
Date:	August 7, 1990
Subject:	Initiation of Action in U.S. District Court
Re:	John D. MacLeod, III
	v.
	Virginia Beach Correctional Center, et al.

Please be advised that your petition has been received, processed and assigned this date to Judge Doumar in Norfolk. You will be kept advised by the court of the status of your case.

Doris R. Casey,
Clerk

AFFIANT'S EXHIBIT C1

IN THE UNITED SATES COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DAVID MACLEOD,
Plaintiff,

v. Misc No. 90-170-N

VIRGINIA BEACH CORRECTIONS CENTER *et al.*
Defendants.

ORDER

Plaintiff has instituted this action pursuant to 42 U.S.C. § 1983 to redress alleged violations of his constitutional rights. Accompanying plaintiff's complaint was a request to proceed in forma pauperis. Before examining the merits of plaintiff's complaint, the Court must conduct an independent inquiry into the prisoner's financial status. See Boyce v. Alizaduh, 595 F. 2d 948, 950 (4th Cir. 1978).

Plaintiff is ORDERED to respond to the following interrogatories within twenty (20) days of the date of this order:

(1) State the names and addresses of the institution(s) at which you were incarcerated during the six months preceding the filing of your complaint, from February 2, 1990 to August 2, 1990.

(2) State the date on which you arrived at and the date on which you were transferred from each institution listed. For your present place of incarceration, you need not give the date of transfer since you are presumably still there.

Failure to comply with this order may result in dismissal of this action.

AFFIANT'S EXHIBIT C2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff

v. Misc. Action No. 90-170-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendants.

ORDER

Plaintiff has submitted a pro se complaint, pursuant to 42 U.S.C. § 1983, to redress alleged violations of his constitutional rights. Although plaintiff has requested leave to proceed in forma pauperis, the Court notes that in the six months immediately preceding the submission of this complaint, plaintiff deposited a total of $1,091.75 in his prison account, which sum includes the amount on deposit at the beginning of the six-month period.

In accordance with the Fourth Circuit Court of Appeals decision in Evans v. Croom, 650 F. 2d 521 (4th Cir. 1981), cert. denied, 454 U.S. 1153 (1982), the Court would normally direct the plaintiff to pay a partial filing fee representing 15% of the plaintiff's deposits over the six-month period preceding submission of the complaint. However, 15% of the sums received in the plaintiff's trust account for the preceding six months exceeds the statutory filing fee. Thus, the Court DIRECTS plaintiff to pay the statutory filing fee of $120.00. If plaintiff objects to paying this filing fee, he may present to the Court any special circumstances which would justify a

AFFIANT'S EXHIBIT C3

IN THE UNITED STAES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff,

v. Misc. Action No. 90-170-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendants

ORDER

Plaintiff filed this action pursuant to 42 U.S.C. § 1983. By order of September 26, 1990 this Court ordered plaintiff to pay the statutory filing fee of $120.00, based on the amount of deposits in plaintiff's account during the six months prior to submission of his complaint. Plaintiff has objected to this fee, stating his only source of income was his recently deceased mother and that he must spend what funds he has on canteen items.

A prisoner seeking indigent status is in a unique position. He is assured of the necessities of life, housing, food, clothing and medical care at state expense. Thus, his financial needs are not similar to those of people in ordinary life. Evans v. Croom, 650 F. 2d 521 (4th Cir. 1981), cert. denied, 454 U.S. 1153 (1982). Accordingly, it is not unreasonable for a prisoner to be required to make some contribution, however minimal, to the maintenance of his action. To do so merely forces a prisoner "to confront the initial dilemma which faces most other potential civil litigants: is the merit of the claim worth the cost of pursuing it?" Braden v. Estelle, 428

AFFIANT'S EXHIBIT C4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff

v. Misc. Action No. 90-170-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendants.

ORDER

Plaintiff has brought this pro se action pursuant to 42 U.S.C. § 1983 alleging a deprivation of his constitutional rights.

By order dated September 26, 1990, this Court directed plaintiff to pay the full filing fee of $120.00, based upon the fact that plaintiff had deposited over $1000.00 into his prison account during the six months prior to submitting the complaint. Plaintiff responded with objections to paying the fee. By order dated October 15, 1990, the fee was reduced to $108.00. Plaintiff filed an interlocutory appeal from that order, which was denied for lack of jurisdiction by the Fourth Circuit Court of Appeals. MacLeod v. Va. Beach Corr. Center, No. 90-6169 94th Cir. Dec. 18, 1990).

Plaintiff has again objected to paying the reduced filing fee. Plaintiff has stated that the money he had received was from his mother, who has since died in a car accident, and that he has no present source of income. Plaintiff maintains that the sums deposited

AFFIANT'S EXHIBIT C5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendants.

ORDER

Plaintiff has brought this pro se action pursuant to 42 U.S.C. § 1983 alleging a deprivation of his constitutional rights.

In compliance with the Court's order of December 31, 1990, plaintiff has remitted the partial filing fee as required for the maintenance of this action, and the complaint has been filed.

Defendants are ORDERED to submit file responsive pleadings to plaintiff's complaint within twenty-three (23) days of the date of this order.

Plaintiff has moved for appointment of counsel. Plaintiff's motion for appointment of counsel was submitted on 8 1/2 x 14 inch legal-size paper. Plaintiff is ADVISED that the federal courts may accept submissions which are filed on 8 1/2 x 11 inch paper only, and may not accept those submissions which are filed on legal-size paper. Plaintiff is ADVISED that all further filings submitted on paper other than 8 1/2 x 11 inch paper will be returned to him, and the Clerk is DIRECTED to return to the plaintiff any such filings.

AFFIANT'S EXHIBIT C6

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendants

ORDER

This Court has received defendant's motion for summary judgment in the above-styled action.

Plaintiff may, if he so desires, respond to defendant's motion for summary judgment with any material he wishes to offer in rebuttal within twenty (20) days from the date of this order. Such material may be in the form of affidavits made by persons having firsthand knowledge of the facts to which the statements refer. There are two alternative ways for submitting an affidavit to the Court, one of which must be followed. One way is for the person making the affidavit to sign the affidavit and swear to its truth before a notary public. The other way, which does not require a notary public, is for the person making the affidavit to sign the affidavit and certify that he signs under penalty of perjury and understands that he may be prosecuted if the facts he sets forth are untrue.

In addition to such material, plaintiff may file a legal brief supporting his view of the case.

AFFIANT'S EXHIBIT C7

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD
Plaintiff,

v. Civil Action No 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendants.

ORDER

Plaintiff filed this suit pursuant to 42 U.S.C. § 1983, claiming violation of his constitutional rights. Defendants moved for summary judgment. By order entered March 25, 1991, the Court ordered plaintiff to file a brief and/or affidavits within twenty (20) days.

Plaintiff's place of incarceration has changed a number of times, and he has requested an extension of time in which to file his response to defendants' motion for summary judgment. Plaintiff's motion is GRANTED.

Plaintiff is ORDERED to file his brief and accompanying affidavits, if any, within twenty (20) days from the date of this order. Should plaintiff fail to submit such materials within twenty (20) days, the Court has the power to enter judgment against him on the basis of the defendants' motion and the accompanying affidavit.

The Clerk is DIRECTED to send a copy of this order to the plaintiff and to counsel for the defendants.

AFFIANT'S EXHIBIT D1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JOHN DANIEL MACLEOD, III
Plaintiff

v. Misc. Action No.: 90-170-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendants.

MOTION FOR APPOINTMENT OF COUNSEL

Plaintiff John Daniel MacLeod III, pursuent to 18 U.S.C. Sec. 3006A(g) requests this Court to appoint counsel to represent him in this action for the following reasons:

1. The Plaintiff is unable to afford counsel as evidenced by his motion to proceed in forma pauperis and affidavit in support filed with this court.
2. The Plaintiff has only a limited knowledge of the law.
3. The issues involved in this action will require investigation which the Plaintiff cannot do while confined in jail.
4. The issues involved in this action will require complex discovery which the Plaintiff does not feel himself competent to conduct.
5. In violation of rule 9(c) of this facility the Plaintiff is now being deprived of all access to the law library and of case law from the Wahab Public Law Library though other Pro Se litigants continue to receive library access and/or case law regularly and that without such access and case law the Plaintiff cannot prepare proper briefs or evaluate court decisions.

AFFIANT'S EXHIBIT D2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JOHN DANIEL MACLEOD, III,
Plaintiff,

v. Misc. Action No: 90-170-N

VIRGINIA BEACH CORRECTIONAL
CENTER et al.,
Defendants.

BRIEF IN SUPPORT OF
APPOINTMENT OF COUNSEL

Plaintiff John Daniel MacLeod III, has requested this Court to appoint counsel to represent him concerning the above referenced action. The Court has discretion pursuent to 18 U.S.C. Section 3006A(g) to appoint counsel concerning matters brought pursuent to 42 U.S.C. Section 1983. For the reasons stated in Plaintiff's motion for appointment of counsel and based on the allegations contained in his Complaint this Court should appoint counsel.

/s/
John D. MacLeod, III

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a true copy of the foregoing brief has been mailed to Deputy Haley and the Virginia Beach Correction Center et al. in the care of Sheriff Drew at 2501 James Madison Blvd. in Virginia Beach on the 21st. day of January 1991.

/s/
John D MacLeod, III

AFFIANT'S EXHIBIT D3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK VIRGINIA

JOHN DANIEL MACLEOD,
Plaintiff

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendants.

REQUEST FOR EXTENSION
OF TIME TO FILE

COMES NOW the Plaintiff, John D. MacLeod, Pro Se, and in response to the Court's order of March 26, 1991 that he respond to Defendant's 12(b)(6) motion within twenty (20) days deposes and says:

1. That he does wish to file one or more Affidavits and a Brief in support of his case.

2. That as the Court was recently advised, he is currently being classified at the Virginia Department of Correction's Powhattan Reception and Classification Center which does not have adequate Law Library and that his legal materials and evidence have been impounded for the duration of his stay at this facility.

The Plaintiff therefore moves this Court to grant him a ninety (90) day extension of its April 15th, 1991 filing deadline.

I ask this:

/s/
John Daniel MacLeod, III

AFFIANT'S EXHIBIT D4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD, #183041
Bland Correctional Center
Route 2, Box 111
Bland, VA 24315-9616
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL
CENTER et al.,
Defendants.

CHANGE OF ADDRESS NOTICE

TAKE NOTICE that the Plaintiff, John D. MacLeod, III, has been transferred into the custody of the Virginia Department of Corrections and is currently housed at the Bland Correctional Center whose address is given above.

/s/
John Daniel MacLeod, III

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing notice has been mailed to Conrad M. Shumadine and Mark D. Stiles, WILCOX & SAVAGE, P.C., 1800 Sovran Center, Norfolk, VA 23510-2197 on the 22nd day of April, 1991.

/s/
John D. MacLeod III

AFFIANT'S EXHIBIT D5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendants.

PLAINTIFFS RESPONSE TO DEFENDANT'S MOTION TO DISMISS

COMES NOW the Plaintiff, John D. MacLeod, Pro Se, and herein for his response to the Defendant's 12(b)(6) motion alleging that he has failed to state a claim cognizable under 42 U.S.C. § 1983 the Plaintiff deposes and says:

1. That on or about July 8th, 1990 he was maliciously charged with a major violation of the Rules and Regulations of the Virginia Beach Correction Center for which the punishment can include punitive isolation and loss of good time.

2. That the aforesaid charge was not, as alleged, dismissed but was, in fact, "Dismissed with a warning" which, being tantamount to a motion to nolle prosequi, infers that the Plaintiff was, in fact, guilty of the offense but was not prosecuted for reasons unknown.

3. That on or about July 8th, 1990 he was maliciously, selectively, and unjustifiably placed on cell restriction and consequently denied visitation.

AFFIANT'S EXHIBIT D6

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendants.

AFFIDAVIT OF
JOHN DANIEL MACLEOD

COMMONWEALTH OF VIRGINIA
COUNTY OF BLAND, to-wit:

This day personally appeared before me, a notary public in and for the Commonwealth of Virginia, County of Bland, John D. MacLeod who, after having been first duly sworn, states as follows:

1. My name is John Daniel MacLeod and I am a convicted felon presently incarcerated and serving time at the Bland Correctional Center in Bland County. At all times relevant to the events which gave rise to my first cause of action in this matter I was a pretrial detainee confined in the Virginia Beach Correctional Center and assigned to cell seven (7) of block two-jay (2J).

2. At no time during my occupancy of the aforesaid cell did I place a "wooden checker" or any "similar object" in the lock mechanism of the door of said cell or by any means attempt to defeat or impair the operation of said lock mechanism.

3. At no time during my occupancy of the aforesaid cell did I observe anyone else place a "wooden checker" or any "similar object" in the lock mechanism of the door of said cell

AFFIANT'S EXHIBIT D7

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S RESPONSE

The Defendants have filed motion pursuent to Rule 12(b)(6) of the Federal Rules of Civil Procedure alleging that the Plaintiff's complaints that Deputy Donald V. Haley, and others, acting under color of law maliciously charged him with a major violation of the rules of the Virginia Beach Correctional Center where he was detained at the time, that incident to being so charged he was maliciously, unjustifiably, and selectively placed on cell restriction and denied visitation, and that he was subsequently denied due process in attempting to vindicate himself of the charge are not cognizable in this Court. For the reasons stated herein the Plaintiff asserts that his claims are cognizable under 42 U.S.C. § 1983 or the pendent jurisdiction of this Court.

FACTS

At all times relevant to this first cause of action the Plaintiff was a pretrial detainee in the Virginia Beach Correctional Center. At or about 1:50 A.M. on Sunday, July 8th, 1990 the Plaintiff, who had

AFFIANT'S EXHIBIT D8

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER, et al.,
Defendants.

AFFIDAVIT OF
DAVID P. THRASHER

COMMONWEALTH OF VIRGINIA
COUNTY OF BLAND, to-wit:

This day personally appeared before me, a notary public in and for the Commonwealth of Virginia, County of Bland, David P. Thrasher, who after having been first duly sworn, states as follows:

1. My name is David P. Thrasher and I am a convicted felon presently incarcerated and serving time at the Bland Correctional Center in Bland County Virginia.

2. Prior to my transfer to this facility I was temporarily held at the Powhatan Reception and Classification Center in State Farm Virginia.

3. At no time while I was incarcerated at Powhatan was I aware of having been accused of a serious violation of Virginia Department of Corrections regulations concerning inmate discipline as set forth in their DGL-861 guideline, particularly Offense 222 which is described as a verbal assault on an employee of the Virginia Department of Corrections.

AFFIANT'S EXHIBIT E1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The Plaintiff has filed this suit pursuant to 42 U.S.C. § 1983 alleging that Deputy Haley and others conspired to accuse and convict him of a major violation of Correctional Center rules thus resulting in his denial of visitation privileges for approximately one day. For the reasons stated herein the plaintiff has failed to state any claim recognizable under 42 U.S.C. § 1983.

FACTS

At all times relevant to this action the plaintiff was a pretrial detainee in the Virginia Beach Correctional Center ("Correctional Center"). At or about 1:50 a.m. on Sunday, July 8, Deputy Haley and other inmates were conducting a routine cell block lockdown when they discovered that the door to the plaintiff's cell would not lock because a wooden checker or similar object had been placed in the lock mechanism. The plaintiff was asked to remove the foreign object from the lock but he did not do so. The plaintiff was then cited

AFFIANT'S EXHIBIT E2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER et al.,
Defendant.

MOTION TO DISMISS

NOW COME the defendants, Deputy Donald V. Haley and the Virginia Beach Correctional Center, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and move this Court to dismiss the plaintiff's Complaint for failure to state a claim upon which relief may be granted in that it fails to state a deprivation of any right or privilege protected by the Constitution or laws of the United States and therefore fails to state any claim recognizable under 42 U.S.C. § 1983.

Virginia Beach Correctional Center
Deputy Donald V. Haley

/s/
Of Counsel

Conrad M. Shumadine
Mark D. Stiles
WILLCOX & SAVAGE, P.C.
1800 Sovran Center
Norfolk, Virginia 23510-2197
(804) 628-5500

AFFIANT'S EXHIBIT F1-F4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD,
Plaintiff,

v. Civil Action No. 91-68-N

VIRGINIA BEACH CORRECTIONAL CENTER
and
DEPUTY HALEY,
Defendants.

ORDER

Plaintiff filed this suit pursuant to 42 U.S.C. § 1983, claiming violation of his constitutional rights. Defendants moved for summary judgment. Plaintiff has responded with a brief and affidavits, and the matter is ready for decision. For the reasons stated below, defendants' motion for summary judgment is GRANTED and the case is DISMISSED.

Plaintiff John Daniel MacLeod alleges that on July 8th, 1990, while incarcerated at the Virginia Beach Correctional Center, plaintiff was falsely charged with a major violation of jail regulations, namely, tampering with the lock mechanism on the door to his cell. As a result, he was confined to his cell pending a hearing, and subsequently was denied visitation with his sister and her three children. Plaintiff seeks $350.00 in reimbursement for travel expenses and $10,000.00 in punitive damages.

The prison's Inmate Violation Report states that at 1:50 a.m. on July 8, 1990,

> while conducting a lock down of 2J, Cell 7 refused to secure. It was discovered that a checker, or similar object, was preventing the door from securing. MacLeod was ordered to remove the object, but another inmate from the floor did instead. The cell then was secured properly.[1]

According to the affidavit of Major Willard Smith, commanding officer at the jail, tampering with a security device is a major violation of prison regulations. The watch commander determined MacLeod to be a security risk and recommended that MacLeod be confined to his cell with loss of all privileges pending further review. Major Smith reviewed the matter the next day, July 9, and dismissed the charge with a warning. No further action was taken against MacLeod.

The Court initially observes that plaintiff has brought suit only against the deputy who reported the alleged offense, and not the officers who could be considered to have disciplined him, the watch commander and Major Smith. The Court is not aware of any case holding that the mere filing of a charge, absent disciplinary action, gives rise to a § 1983 claim.

Plaintiff contends that he never placed any object to obstruct the lock mechanism and that he never refused to obey an order from a deputy. Regardless of his objection to the filing of a charge against him, plaintiff cannot maintain that he was in any way denied due process in the resolution of the charge, inasmuch as it was dismissed the day after it was filed. Plaintiff received all the process due him under the ruling in Wolff v. McDonnell, 418 U.S. 539 (1976). Plaintiff seems to object to the fact that the charge was dismissed

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[1] A different copy of the same form indicates that plaintiff did in fact remove the object. The disparity does not appear to be material.

with a warning, "which, being tantamount to a motion to nolle prosequi, infers that the Plaintiff was, in fact, guilty of the offense but was not prosecuted for reasons unknown." This objection is frivolous, as plaintiff suffered no adverse consequence as a result of the dismissal with a warning.

Plaintiff can only complain, if at all, about the denial of privileges during the interim period between the filing of the charge and its dismissal. Prison authorities have wide latitude, and indeed a positive obligation, to take reasonable measures to guarantee the security of the prison. Hudson v. Palmer, 468 U.S. 517, 526-27. In this case, a prison guard discovered that a cell lock mechanism had been tampered with and suspected plaintiff to be responsible. The watch commander determined plaintiff to be a security risk, and confined him to his cell for a period of less than 48 hours. This cannot be said to be unreasonable.

In any event, the only deprivation suffered by plaintiff during his confinement was loss of visitation privileges. However, visitation is not a liberty interest protected by the due process clause. Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. 1904, 1908-09 (1989); White v. Keller, 438 F. Supp. 110 (D. Md. 1977), aff'd, 588 F. 2d 913 (4th Cir. 1978) (adopting the district court opinion). Visitation is "at best a non-fundamental right, and hence may not only be restricted, but may be restricted by other than the least drastic means." White v. Keller, 438 F. Supp. at 118. Although plaintiff has not alleged that prison regulations created such a liberty interest, even if they did, plaintiff was afforded sufficient procedural due process in the deprivation of those rights. See Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. at 1908-10.

For the foregoing reasons, defendant's motion for summary judgment is GRANTED and the complaint is DISMISSED.

Plaintiff is ADVISED that he may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, Room 193 U.S. Courthouse, 600 Granby Street, Norfolk, Virginia 23510, which said written notice must be received by the Clerk within thirty (30) days from the date of this

order and may be filed without the prepayment of costs or giving security therefor.

The Clerk is DIRECTED to send a copy of this order to the *plaintiff and to counsel for the defendants.*

IT IS SO ORDERED.

/s/
United States District Judge

At Norfolk, Virginia
June 10, 1991

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

March 25, 1992

John Daniel MacLeod, III, #183041
Bland Correctional Center
Route 2, Box 143
Bland, Virginia 24315-9615

RE: MacLeod v. Virginia Beach Correctional Center et al.

Dear Mr. MacLeod:

The above-entitled petition for a writ of certiorari was postmarked March 23, 1992 and received March 24, 1992. The papers are returned for the following reason(s):

Please see Rule 33 in regard to the printing requirements. Please send this office 40 copies of your petition and your check for $300.00.

Very truly yours,

In Forma Pauperis Department
(202) 479-3025

Enclosures: